National Energy Board | Office national de l'énergie

Reasons for Decision

Hélène Campbell - TransCanada PipeLines Limited

MH-1-2007

March 2008

Relocation and Right of Entry

Canada

National Energy Board

Reasons for Decision

In the Matter of

Hélène Campbell - TransCanada PipeLines Limited

Application dated 29 March 2007 regarding relocation of a pipeline and application dated 20 April 2007 regarding right of entry

MH-1-2007

March 2008

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Abbreviations

Act	*National Energy Board Act*
BAPE	Bureau d'audiences publiques sur l'environnement
Board or NEB	National Energy Board
CPTAQ	Commission de protection du territoire agricole du Québec
TAQ	Tribunal administratif du Québec
TransCanada	TransCanada PipeLines Limited
UPA	Fédération de l'Union des producteurs agricoles de Saint-Hyacinthe

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* and the Regulations made thereunder; and

IN THE MATTER OF an application dated 29 March 2007 by Hélène Campbell pursuant to section 46 of the Act regarding the relocation of TransCanada's existing gas pipeline to prevent interference with tile drainage on her land, under file OF-Fac-Gas-T211-2006-01 02; and

IN THE MATTER OF National Energy Board Hearing Order MH-1-2007 dated 16 July 2007 and Amending Orders AO-1-MH-1-2007 and AO-2-MH-1-2007;

HEARD in Saint-Jean-sur-Richelieu, Quebec on 9, 10 and 11 January 2008;

BEFORE:

J.S. Bulger	Presiding Member
S. Leggett	Member
R.R. George	Member

Appearances	**Participants**	**Witnesses**
H. Campbell	Owner	J. Asnong S. Barringon P. Benoît G. Lamarre J.M. Lauzon
K. Delwaide J. Forrest	TransCanada PipeLines Limited	G.Avoine D. Cossette S. Hamilton R. Racine C. Veilleux
J. Asnong	Owner's husband	
C. Beauchemin	National Energy Board	

Chapter 1

Introduction

1.1 Background

In 1966, TransCanada PipeLines Limited (TransCanada) built a pipeline (the existing pipeline or the 1966 pipeline), which crosses Hélène Campbell's lands in Saint-Sébastien, Quebec. On 20 March 2006, TransCanada applied for and received approval, pursuant to section 58 of the *National Energy Board Act* (the Act), to construct the Saint-Sébastien Loop, which consists of 6.5 km of looping of the 1966 pipeline. However, TransCanada was not able to acquire the necessary land rights to construct the Saint-Sébastien Loop.

TransCanada's existing pipeline crosses land owned by M[me] Campbell, diagonally and for a distance of approximately 1.2 kilometres on lots 185, 186 and 187 in the Saint-Sébastien land register in the Province of Quebec. The pipeline was authorized under certificate GC-27 as part of an application to construct and operate a system to export natural gas to Vermont. A map showing the location of the existing and proposed pipelines in relation to M[me] Campbell's land is shown in Figure 1-1.

1.2 Section 46 application

M[me] Campbell filed an application dated 29 March 2007 with the National Energy Board (the Board or NEB) pursuant to section 46 of the Act, to change the route of TransCanada's existing pipeline on the grounds that it interfered with her tile drainage system. She submitted that a change to the route of the existing pipeline and of the Saint-Sébastien loop to follow lot and field boundaries would remedy the problem.

1.3 Section 104 application

The Board also received an application by TransCanada, dated 20 April 2007, filed pursuant to section 104 of the Act, for immediate right of entry to M[me] Campbell's lands. TransCanada submitted that it had been in negotiations with M[me] Campbell since 28 September 2005 to acquire an easement and access rights, and that the remaining issues related primarily to compensation and operation of the pipeline. On 7 May 2007 M[me] Campbell filed an objection to the section 104 application, and TransCanada filed a response on 15 May 2007.

On 3 May 2007, the Fédération de l'Union des producteurs agricoles de Saint-Hyacinthe (the UPA), on behalf of landowners, including M[me] Campbell, filed comments on the application by TransCanada. On 4 May 2007, the UPA also filed a copy of the report prepared by the Bureau d'audiences publiques sur l'environnement (BAPE), to supplement their comments. The UPA did not attend or intervene at the hearing.

1.4 Hearing in the matter of the applications by M^me^ Campbell and TransCanada

The Board decided that the most effective way of examining these issues was to hear both applications together, in a two-part hearing. At Part 1 of the hearing, the Board would consider the issue of whether the existing pipeline and the Saint-Sébastien Loop interfered with, or were likely to interfere with, M^me^ Campbell's tile drainage.

If upon completion of Part 1 the Board ruled that the current pipeline was interfering with tile drainage and that the Saint-Sébastien Loop could interfere with tile drainage, it would determine the procedures for Part 2 of the hearing. A second oral hearing would be held to discuss the outstanding issues, including the location of the new route, whether there were concerns with respect to that route, and whether there were other ways of mitigating the interference.

The Board issued Hearing Order MH-1-2007 on 16 July 2007, setting out the procedures and timetable of events for the oral hearing and the list of issues to be examined during the hearing. The list of issues established for Part 1 of the MH-1-2007 hearing included the following:

1. whether the route of the existing pipeline should be moved to prevent interference with M^me^ Campbell's tile drainage;

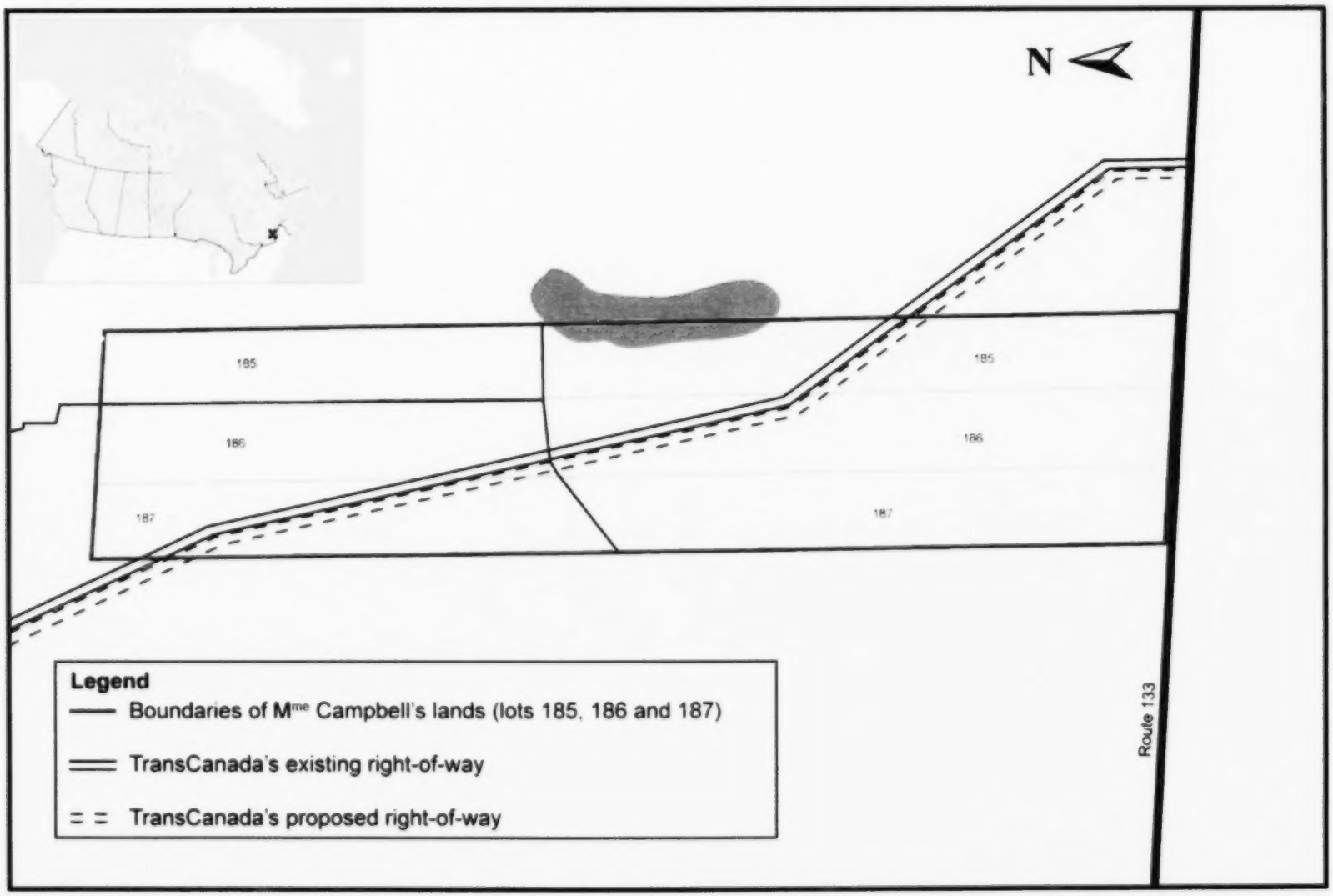
2. whether the route of the Saint-Sébastien Loop should be altered to prevent interference with the tile drainage; and

3. whether the Board should grant TransCanada's right of entry application with respect to M^me^ Campbell's lands.

In order to determine whether the route of the Saint-Sébastien Loop should be relocated as well, the Board would also consider, pursuant to section 21 of the Act, whether the route approved in the ruling on the section 58 application should be altered with respect to M^me^ Campbell's lands.

On 8 January 2008, the three panel Members toured the Saint-Sébastien area by car to gain a perspective on the evidence filed. This tour and the Members' observations were explained to the parties during the Presiding Member's opening remarks. The oral hearing was held in Saint-Jean-sur-Richelieu, Quebec, 9, 10 and 11 January 2008.

Figure 1-1
Map Showing M^me^ Campbell's Lands[1]



1 This figure is based on the application filed with the Board by TransCanada for the 2007 Eastern Mainline Expansion.

Chapter 2

Whether the route of the existing pipeline should be moved to prevent interference with M^{me} Campbell's tile drainage

2.1 Background

On 29 March 2007, M^{me} Campbell filed an application with the Board pursuant to section 46 of the Act to relocate or change the existing pipeline route to remedy drainage problems that were allegedly threatening the viability of her business. The existing right-of-way represents an area 12.2 metres wide and approximately 1,245 metres in length on lots 185, 186 and 187.

This chapter will address the issue of whether or not there is interference with the tile drainage as a result of the existing pipeline, and the location of the existing pipeline.

2.2 Position of M^{me} Campbell

According to M^{me} Campbell, "[Translation] It has been determined that my [the] lots 185, 186 and 187 are mainly composed of Bearbrook-type clay. We all agree that clay soils are very vulnerable to compaction, which is why they must be cultivated under ideal conditions, something I have always made a point of doing. We all know that clay soil has poorer water conductivity than most other soils. As a result, drains must be kept close or closer together to ensure proper drainage. A local drainage problem is having impacts not only at this location, but over a larger area as well. Because the pipeline crosses my land diagonally, and because the right-of-way does not drain as quickly owing to the lack of drains and soil compaction, the right-of-way must be properly drained so that I can cultivate all of my lands."

M^{me} Campbell indicated that the soil on the right-of-way is not properly drained underground, with the result that the water table goes down more slowly at that location, delaying seeding, fertilizing, pesticide application and harvesting on the right-of-way. She added that because the clay soils are extremely vulnerable to poor drainage, they have to be worked under ideal conditions (dry conditions) to prevent compaction and loss of yield, and that as a result, seeding and cultivation delays are reducing crop yields on all the fields affected by the pipeline, jeopardizing the viability of her business.

M^{me} Campbell concluded that the right-of-way is creating pools of water on both sides, despite the installation of tile drainage.

In support of her statements, M^{me} Campbell filed expert reports for the purposes of the hearing, and had the authors of the reports (Ms. Barrington, Mr. Benoît, Mr. Lamarre and Mr. Lauzon) attend the hearing, where they were cross-examined.

Figure 2-1
Typical view of clay on the pipeline route[2]

2.2.1 Interference with tile drainage

In a soil profile report, Élizabeth Vachon, agronomist, stated that it was apparent in May 2007 that crop losses were being caused by the drainage problem at the site where the pipeline is located. She also noted that poor crop growth is frequently observed at this location, even during an exceptional year like 2007, and that the right-of-way is causing pools of water on both sides, despite the installation of tile drainage. These statements were attached to photographs, one of them of grain-corn showing an available phosphorus deficiency and others showing poor plant growth at the site of the pipeline route. Ms. Vachon conceded that her report was preliminary and that it was not an expert report.

Pierre Benoît, engineer, agronomist and co-author of an expert report for the firm F. Bernard experts-conseils, noted that underground drains were installed across the farm to improve drainage, except in the area immediately adjacent to the pipeline. Between the drain manifold on the south side of the pipeline and the end of lateral drains on the north side, he observed undrained areas 24 metres in width on lot 185, 30 metres in width above the pipeline on lot 186 and 15 metres in width on lot 187. According to Mr. Benoît, the drains should instead be spaced 10 to 15 metres apart.

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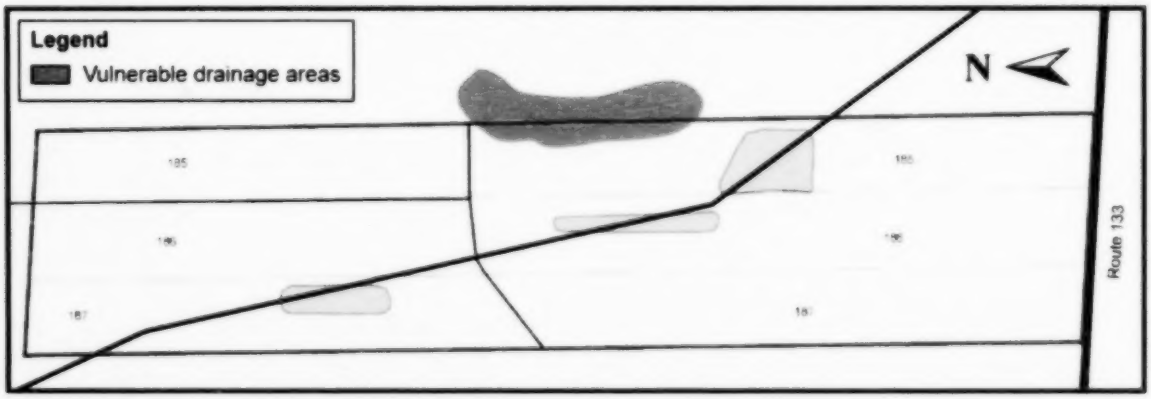
2 This photograph is taken from the expert report prepared by F. Bernard experts-conseils, Exhibit B-21C, Schedule 4.

Figure 2-2
Grain-corn showing phosphorus deficiency[3]

Figure 2-3
Map of lots 185, 186 and 187 identifying three vulnerable drainage areas[4]



Mr. Benoît's report also contained figures, including a map of lots 185, 186 and 187 identifying three vulnerable drainage areas.

Suzelle Barrington, PhD, engineer and agronomist, produced a report titled *Impact du gazoduc sur le drainage des terres de Hélène Campbell*. Ms. Barrington stated that when she visited the lots in August 2007 she noted that the corn was a deeper yellow on the pipeline route, near the Labonté watercourse. She also stated that the underground drainage system at this location is more spread out, resulting in a less well-controlled water table. Given that the corn plants that were a different colour were located above the right-of-way and not across a very wide surface that may have included a work space used when the pipeline was deepened in 1998, according to Ms. Barrington it would be logical to attribute the problem to the low number of underground drains and poorer soil drainage. During the hearing, Ms. Barrington specified that she was able to identify the pipeline route by the yellow markers.

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3 This photograph is taken from the soil profile report prepared by Dura-Club inc, Exhibit B-5B, p.5.

4 This map is based on an illustration taken from the expert report prepared by F. Bernard experts-conseils, Exhibit B-21C, Schedule 2.

In her report, Ms. Barrington also stated that the centre of the property in question is composed of Bearbrook series clay, with a slight slope, and that along both sides the soil is coarser with more of a slope, with the result that the areas composed of Bearbrook series clay may naturally receive drainage water via runoff and underground pressure, particularly in the spring when there is substantial water infiltration in the soil. She indicated that the pipeline built in 1966 is located in Bearbrook series clay soil, at the foot of the slopes, where this slope changes from relatively steep to slight over a length of 700 to 750 metres. According to Ms. Barrington, this is a bad location because that is where the water tends to accumulate. Also, according to Ms. Barrington, the pipeline route crosses the lots diagonally and increases the space between the underground drains because of the width of the right-of-way, with the result that it is impossible to maintain adequate spacing between the underground drains, where it is critical that the water table drop in order to grow and protect crops during rainy summers. Ms. Barrington also noted in her report that the underground drains located on lots 185 and 186 were working properly in the area of the pipeline.

For her report, Ms. Barrington also conducted soil density tests and a statistical analysis (ANOVA) of the soil density values used. She decided to reject samples containing silt because the presence of silt affects soil texture, changing the density of the samples. The values used (in bold on Table 1 of her report) showed a significant difference ($P< 0.05$) between the clay soils taken above the pipeline and those taken 20 metres from the pipeline, i.e., outside the right-of-way but possibly within the work area used when the pipeline was built in 1966. She added that in this report, the soil density study indicated that there may have been compacting resulting from the double spacing of the underground drains in the right-of-way area, but that this problem required more in-depth study. Also, during the hearing, Ms. Barrington stated that, "[Translation] Urgel Delisle & Associés did the same work I did, and if you look at their samples, you can also see, for the same percentage of clay, higher soil density on the right-of-way than off the right of way." However, she subsequently qualified that statement by explaining that the samples taken on the right-of-way and off the right-of-way show a general trend, but do not make it possible to conclude that the density is higher on the right-of-way than off the right-of-way on lots 185, 186 and 187. Ms. Barrington further stated that particle-size analyses would not provide any additional information.

Jean-Marc Lauzon, engineer, hydrogeologist and co-author of an expert report for TechnoRem Inc., concluded that there is no hydraulics link between the surface accumulations of water and groundwater on lot 185, and that this conclusion also applies to lot 187. Mr. Lauzon explained that the lack of a hydraulics connection between standing surface water and groundwater is evidence of a low vertical drainage capacity (drainage problem) caused by the nature of the soils and their degree of compaction and/or the lack of an effective surface drainage system. He also stated that according to the data gathered for the report, the underground drainage system is not the cause of water accumulations on the surface.

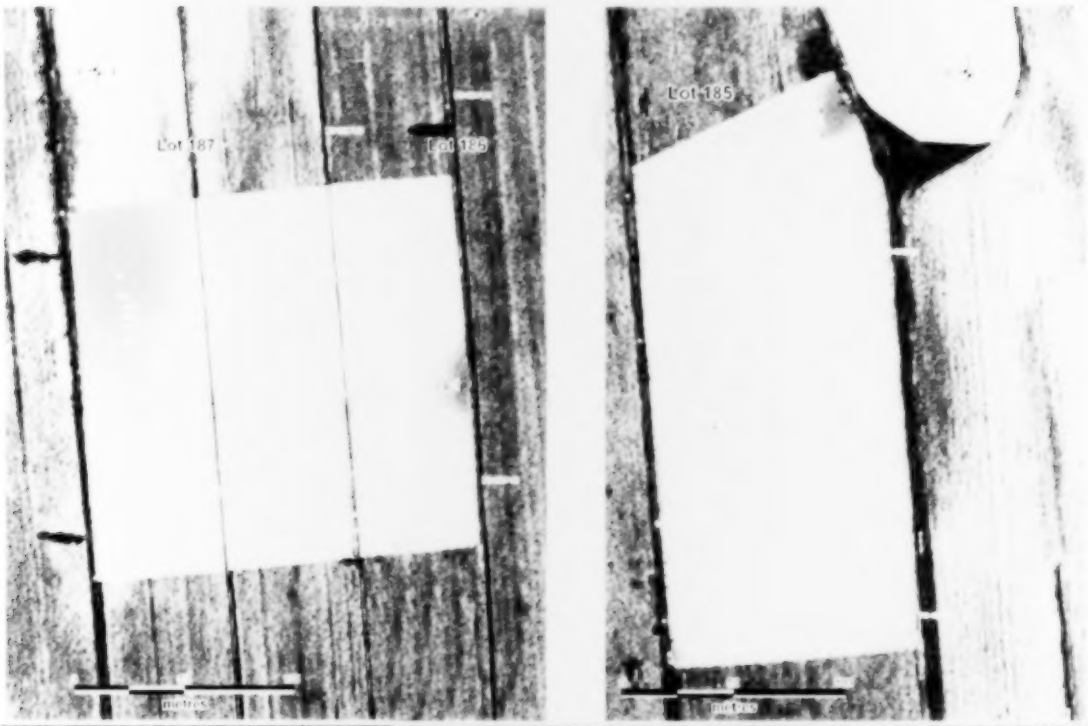
Mr. Lauzon's report also contained figures, including one showing observed groundwater elevations and standing water observed on the surface as of the date of the report, i.e., November 2007, on lots 185 and 187.

According to the TechnoRem Inc. report, based on the observations and measurements done for the report, the construction of the pipeline in the early 1960s on lots 185 to 187 contributed

substantially to increasing soil compaction. The report also mentioned that the construction of a pipeline involves a series of activities that are connected and contribute, in turn, to soil compacting.

In her reply evidence, Mme Campbell submitted excerpts from transcripts of hearings before the Tribunal administratif du Québec (TAQ) and BAPE containing evidence given by various landowners. Mme Campbell stated during the hearing that these excerpts show that TransCanada takes no responsibility for problems that its pipelines cause to farmers.

Figure 2-4
Observed groundwater elevations, and standing water observed on lots 185 and 187[5]



Legend

- Observation well (identification number)
- Surface contour line, in metres
- Control point associated with GPS data
- Existing pipeline and route
- Trench
- Standing water observed on surface of lots 185 and 187 (approximate)

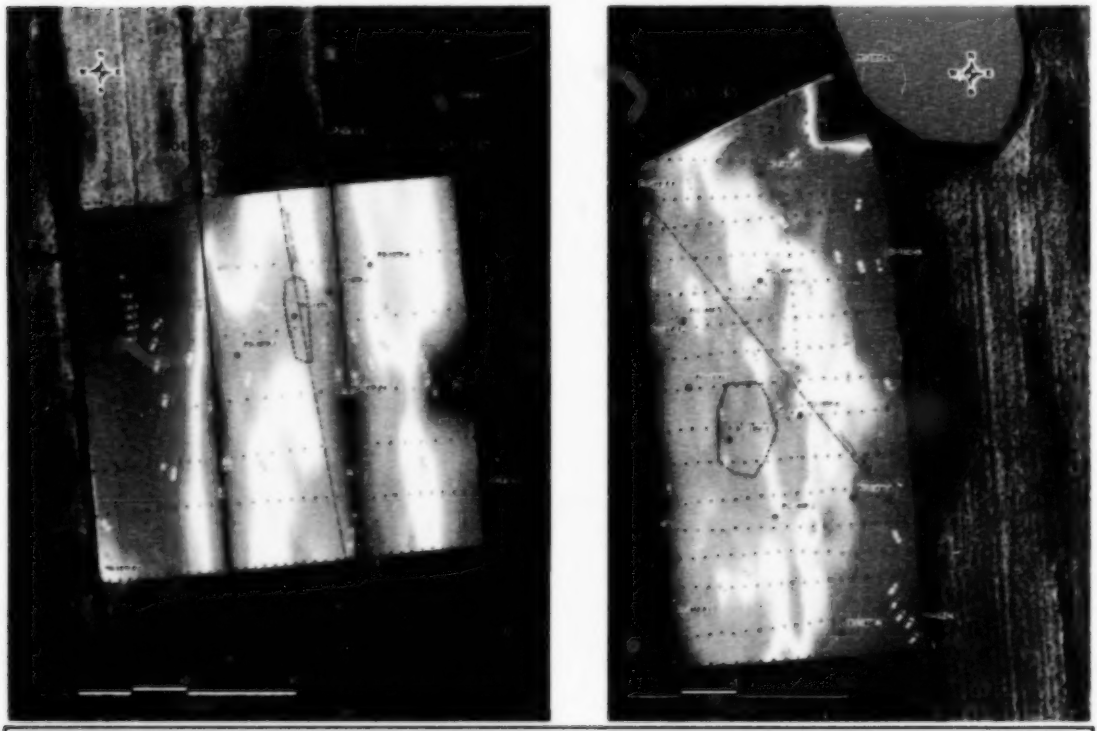
The landform of the water table is illustrated using colour changes, from red (highest) to blue (lowest)

5 This figure is based on an illustration taken from the report prepared by TechnoRem Inc., Exhibit B-230.

substantially to increasing soil compaction. The report also mentioned that the construction of a pipeline involves a series of activities that are connected and contribute, in turn, to soil compacting.

In her reply evidence, M[me] Campbell submitted excerpts from transcripts of hearings before the Tribunal administratif du Québec (TAQ) and BAPE containing evidence given by various landowners. M[me] Campbell stated during the hearing that these excerpts show that TransCanada takes no responsibility for problems that its pipelines cause to farmers.

Figure 2-4
Observed groundwater elevations, and standing water observed on lots 185 and 187[5]



Legend

- Observation well (identification number)
- Surface contour line, in metres
- Control point associated with GPS data
- Existing pipeline and route
- Trench
- Standing water observed on surface of lots 185 and 187 (approximate)

The landform of the water table is illustrated using colour changes, from red (highest) to blue (lowest).

5 This figure is based on an illustration taken from the report prepared by TechnoRem Inc., Exhibit B-23D.

Finally, M^me^ Campbell stated that the aerial photographs taken by TransCanada were poorly documented (rain events) and that the water accumulations observed by M^me^ Campbell's experts were limited to, at, or near, the site of the existing pipeline. She also indicated that when Ms. Barrington analysed soil samples of similar texture, her goal was to eliminate variations and not manipulate the data. With respect to the site visit by Groupe Conseil UDA inc. to Ferme E. et B. Frankhauser, she submitted that the observations should have been made on lands with similar problems and that it is impossible to compare 2006, which had very poor weather, with 2007, which had very good weather.

2.2.2 Location of existing pipeline route

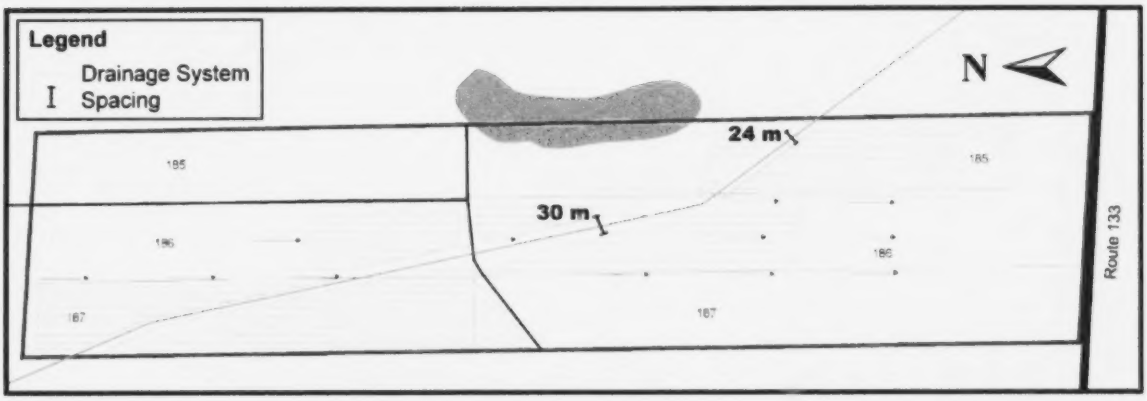
With respect to the location of the existing pipeline route, M^me^ Campbell submitted that it does not reflect the recommendation of Groupe Conseil UDA inc. concerning the application filed with the Commission de protection du territoire agricole du Québec for approval of the Saint-Sébastien Loop. That recommendation read: "[Translation] Promote a pipeline route that runs along field boundary lines and existing infrastructures (road, highway, railway), the boundaries of wooded areas, physical obstacles, power lines in wooded areas, boundaries of lots or concessions."

Mr. Benoît stated in his report that by delaying the drying of the surface of the right-of-way, the existing pipeline is delaying seeding on the three fields that the pipeline crosses diagonally across their entire width. He further stated that this problem means either seeding twice, which requires moving the equipment twice instead of once, or delaying seeding on all the land comprising the three lots so that it can all be seeded at the same time. He thus concluded that the existing pipeline is causing crop losses on the entire property (53 hectares). M. Benoît also stated in his report that work to remove the existing pipeline could be done during dry periods and within a work area limited to a maximum width of five metres, which would affect only a total area of approximately 0.7 hectares, i.e., 0.6 hectares where the soil would be disturbed during removal of the pipeline (1,245 metres x 5 metres) and 0.1 hectares where the soil would be disturbed to install an underground drainage system in the former pipeline site. Mr. Benoît also indicated that laying the existing pipeline and loop in the alternative route would disturb an area of one hectare of soil vulnerable to compaction outside the buffer zone and 0.6 hectares of soil not vulnerable to compaction, as well as compaction in an area taken out of regular crop production to create a buffer zone.

According to the TechnoRem Inc. report, if nothing is done along the existing pipeline route, water will accumulate there constantly, restricting and/or preventing farming.

Georges Lamarre, engineer and agronomist, stated during the hearing that any engineer who designs plans, or designed plans at that time, would be required to stay off the pipeline right-of-way for safety reasons, according to standards established by TransCanada and other pipeline (or telephone) companies to ensure that safety and construction methods complied with standards. Mr. Lamarre indicated that the width of the land left undrained was always dictated by the right-of-way. However, he confirmed that he was responsible for drawing up the drainage plans (for lots 185 and 187) and that the plans could have been designed with the drains more closely spaced, but still off the right-of-way, which is 12.2 metres in width. He specified, however, that although the spacing is slightly different in his opinion, the distances are still equivalent.

Figure 2-5
Map of lots 185, 186 and 187 showing existing drainage system and certain drain spacing distances [6]



2.3 Position of TransCanada

TransCanada stated that based on its pipeline construction expertise and experience, it was pleased to be able to report to the Board that it has taken and continues to take all reasonable and appropriate measures to ensure that owners of agricultural land earmarked for pipeline construction have their land restored to a level of use and productivity equivalent to portions of their land adjacent to TransCanada projects, as quickly as possible. TransCanada also stated that while crops on agricultural land are impacted by pipeline construction, the impact is temporary and generally limited to the construction period, and that in these cases, landowners receive financial compensation for any crop losses.

TransCanada submitted that it has applied this principle in full over the years with respect to lots 185, 186 and 187 operated by M^{me} Campbell, and that the evidence filed by M^{me} Campbell does not show, on a balance of probabilities and pursuant to the Act, that the 1966 pipeline is the cause of the drainage problems alleged by M^{me} Campbell on lots 185, 186 and 187.

TransCanada added that although in its view it was not required to do so, it asked Groupe Conseil UDA inc. to conduct the surveys, tests, verifications and analyses required to propose a modified drainage system on lots 185, 186 and 187, along the pipeline, that would be equivalent to the existing drainage system on the adjacent portions of the said lots. However, this proposal was offered only in the event that the Saint-Sébastien Loop went ahead.

In support of its statements, TransCanada filed expert reports for the purposes of the hearing and presented witnesses at the hearing, including Messrs. Avoine, Racine and Veilleux, who were cross-examined.

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6 This map is based on an illustration taken from the expert report prepared by F. Bernard experts-conseils, Exhibit B-21A, p.5.

2.3.1 Interference with tile drainage

According to the report by Groupe Conseil UDA inc.[7], during their site visit several observations were made concerning parcels of agricultural land crossed by the pipeline and located on lots 185 to 187, as follows:

- substantial accumulations of water at numerous locations on the parcels of agricultural land independent of the pipeline right-of-way;
- grain-corn crops varying from good to very sparse or absent (no seedlings or growth) independent of the pipeline right-of-way;
- deficient surface drainage, inadequate grading creating depressions on land independent of the pipeline right-of-way;
- unfavourable microlandform accentuating the surface drainage problem.

These statements were attached to the aerial photographs of the parcels of land showing accumulations of water on lots 185, 186 and 187.

The report also stated that the sampling results revealed a difference in yield between the control area and the right-of-way area. However, the author stated that the general condition of the field and the very extensive heterogeneity of the resulting crop made it impossible to conclude that the difference in yield was due to the presence of the pipeline.

Groupe Conseil UDA inc. thus found that based on the analysis of the data, it could not conclude that TransCanada's 1966 pipeline right-of-way was responsible for the yield differences observed on the parcels of agricultural land on lots 185 to 187.

Groupe Conseil UDA inc. also examined the crops and condition of the land on another lot, i.e., lot 345, which is owned by Ferme E. et B. Frankhauser, and concluded that the portion of this lot crossed by TransCanada's pipeline, which apparently is composed of Bearbrook clay, did not show drainage-related deficiencies, that the crops were normal and uniform, and that there was no observed difference between the crop on the right-of-way and the crop on adjacent lands.

In its reply evidence and at the hearing, TransCanada commented on the various reports and statements by M^{me} Campbell and her witnesses. Concerning Ms. Vachon's report, TransCanada submitted that she could not conclude that there was compaction without conducting particle-size or other tests to assess compaction, and that the photographs showing poor plant growth above the pipeline route were not conclusive because similar situations were also observed at other locations off the right-of-way and are visible on the aerial photographs taken by TransCanada. With respect to Ms. Barrington, TransCanada submitted that she failed to prove that the 1966 pipeline was responsible for the compaction allegedly observed today. TransCanada also commented on the samples that were rejected during soil density tests conducted by Ms. Barrington, i.e., the samples containing clay texture that was not uniform and contained silt. TransCanada added that Bearbrook clay naturally contains silt and that no particle-size analysis was conducted to show that the comparison was done using similar soils. TransCanada is of the view that the samples should not have been manipulated and should accurately reflect the soil as is.

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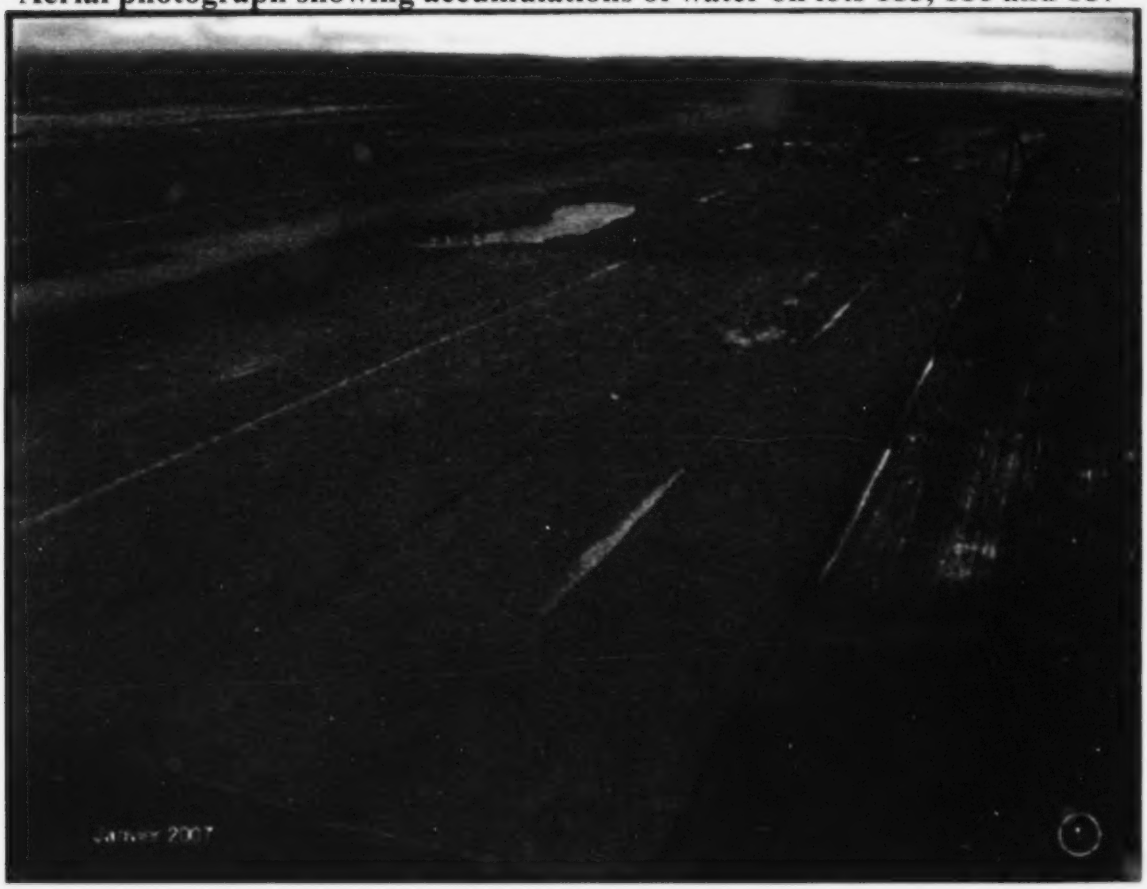
7 The report was prepared by Josée Bédard, agronomist, and checked by Claude Veilleux, engineer and agronomist.

Figure 2-6
Aerial photograph showing accumulations of water on lots 185, 186 and 187[8]



With respect to the report conducted by F. Bernard experts-conseils and Mr. Benoît's statements, TransCanada submitted that the impact of the pipeline as set out in this report was purely theoretical and that no yield measurements were conducted. Moreover, TransCanada called into question the three vulnerable drainage zones identified in Appendix 2 of Mr. Benoît's report. TransCanada stated that these zones represented almost all of the lots and that Mr. Benoît nonetheless concluded that there was a link between the existing situation and the construction of the 1966 pipeline.

Concerning the TechnoRem Inc. report and statements by Mr. Lauzon, specifically those relating to the standing water on lots 185 and 187 observed by TechnoRem Inc., TransCanada again replied that the aerial photographs showed that the accumulations of water were not limited to the right-of-way. TransCanada further submitted that no proof was given to support the statement that the pipeline construction work done on lots 185 to 187 in the early 1960s contributed to a substantial increase in soil compaction. TransCanada pointed out that no compaction tests were done by this firm, and that the other possible causes of compaction were not eliminated.

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8 This photograph is taken from the crop and land monitoring report prepared by Groupe Conseil UDA inc., Exhibit C-2-01C, p.3.

Concerning the standing water on lots 185 and 187 observed by TechnoRem Inc., TransCanada noted that there is a distance of 25 to 30 metres between the point at which the water begins and the pipeline on lot 185, and that the sampling site (PO-185P-5) is 35 to 40 metres from the pipeline. TransCanada added that the right-of-way is 12.2 metres in width and that as a result, this wet area is outside the right-of-way.

2.3.2 Location of existing pipeline

TransCanada commented on the various statements by M[me] Campbell's experts and witnesses concerning the location of the existing pipeline. With respect to Mr. Benoît's conclusion that the existing pipeline is causing crop losses on the entire property (53 hectares) by delaying seeding on the three fields that the pipeline crosses diagonally, TransCanada stated that, "[Translation] you don't delay seeding because of a water hole," and added that access was possible and that if the problem persisted, it would have to be resolved. TransCanada also stated that the decision to delay seeding was a choice. Concerning the impact of removing the existing pipeline, TransCanada estimated that approximately 3.8 hectares would be required for the actual removal, 5.1 hectares would be required to lay the existing pipeline, and approximately 5.1 hectares would be required to lay the proposed pipeline, for an estimated total of 14.1 hectares. According to TransCanada, based on its experience, it would be impossible to do this work within the area suggested by M[me] Campbell.

With respect to TechnoRem Inc.'s statement that without any intervention along the existing pipeline route, there would be standing water constantly, restricting and/or preventing farming, TransCanada noted that even though, in TransCanada's opinion, it was not required to do so, it submitted a proposal to M[me] Campbell, which will be discussed in Chapter 3 of these Reasons for Decision.

With respect to the reports and statements by Mr. Lamarre at the hearing, TransCanada noted that there was no mention in the file of any restriction whatsoever imposed by TransCanada with respect to Mr. Lamarre's drainage plans. TransCanada also pointed out that its research revealed that no such request was ever made, meaning that TransCanada could not have rejected a request to install drains on the right-of-way. TransCanada further stated that Mr. Lamarre could have installed drains wherever he wanted outside the right-of-way, which is 12.2 metres in width (assuming that there were instructions in the 1980s not to install drains on the right-of-way), that it was Mr. Lamarre's choice to space them farther apart, and that such spacing was not dictated by the right-of-way or by TransCanada.

Views of the Board

The Board notes that both parties agree that the soil on the land in question owned by M[me] Campbell (lots 185, 186 and 187) is mainly composed of Bearbrook-type clay, which is vulnerable to compaction and poor hydraulic conductivity. The Board also notes that both parties agree that the accumulations of water were observed on the surface of the said lots. Furthermore, both parties observed variations in grain-corn crop yields, i.e., areas where the corn was a deeper yellow or presented deficiencies, or some locations where it did not grow as well.

The Board notes that the parties disagree on the distribution of the areas where there are accumulations of water and grain-corn crop losses, in relation to the right-of-way of the existing pipeline on M^me^ Campbell's lots. M^me^ Campbell submits that these drainage problems are related to the presence of the pipeline and are causing seeding delays and ultimately, crop losses on all her lands. TransCanada submits that this is a generalized problem, that the crops are heterogeneous, that the accumulations of water are scattered and that the pipeline is in no way responsible for the situation.

The Board further notes that several aspects of the natural environment are conducive to a drainage problem, specifically, soil type, poor grading and a microtopography that causes water to accumulate in the lowest areas, and poor soil conductivity. In addition to these local characteristics, the drainage system design spaced the drains farther apart than provided for in the various engineering reports, and farther apart than the 12.2 metre width of the right-of-way. The spacing of the drains 24 and 30 metres apart on M^me^ Campbell's lands cannot be explained by the existence of the pipeline right-of-way.

In view of all the evidence filed for the purposes of this section 46 application, the Board finds that as the applicant, M^me^ Campbell, who has the onus of proving, on a balance of probabilities, that the existing pipeline should be moved to prevent interference with her drainage system, did not offer sufficient evidence to that effect.

While M^me^ Campbell's file does contain some evidence, it is the Board's view that it is not sufficient to establish a link between the pipeline and interference with the drainage system that could justify moving the existing pipeline. This evidence includes photographs taken by Ms. Vachon and Ms. Barrington, which, although they identify problems with grain-corn crops, do not establish whether or not those problems are linked to the pipeline. Also, the firm F. Bernard expert-conseils identified areas vulnerable to compaction, and TechnoRem Inc. observed areas of standing water. However, in response to this evidence, TransCanada submitted aerial photographs of the lots, taken on different dates, and on which accumulations of water can be seen at several locations in the fields, thus clearly showing that there are water accumulations on lots 185, 186 and 187 that are independent of the right-of-way. Also, these photographs offer visual evidence of a heterogeneous crop with growth variations (not uniform). The Board is therefore satisfied that this evidence as filed by TransCanada is convincing and does not support the statement that these problems are restricted to the pipeline right-of-way. The Board further notes that one of the two areas of standing water identified by TechnoRem Inc. was located outside the right-of-way, i.e., at a distance of 25 to 30 metres.

Consequently, M^me^ Campbell's evidence does not show, on a balance of probabilities, a direct causal relationship between the presence of the existing pipeline and interference with her drainage system. Her evidence is insufficient to justify moving the existing pipeline to prevent it from interfering with her drainage system.

With respect to the various compaction tests, the Board notes that, as acknowledged by Ms. Barrington, three samples is not sufficient to confirm that the soil is more dense on the entire length of the right-of-way than it is off the right-of-way. The Board finds also that the sampling method used by Ms. Barrington does not offer an accurate representation of the condition of the soil. Furthermore, Groupe Conseil UDA inc. also conducted density tests, supported by particle-size analysis, indicating a variation in density within the samples, and concluded that the soil on the right-of-way does not show greater compaction than the rest of the field. As a result, Ms. Barrington's evidence is not conclusive and does not demonstrate a causal relationship between the pipeline and greater density on the entire right-of-way or that the existing pipeline is interfering with M^me^ Campbell's drainage system.

Chapter 3

Whether the route of the Saint-Sébastien Loop should be altered to prevent interference with M^me^ Campbell's tile drainage

3.1 Background

This chapter will address the issue of whether there is a need to alter the route of the Saint-Sébastien Loop, and whether there are alternatives to relocation that will mitigate the observed problems.

3.2 Position of M^me^ Campbell

M^me^ Campbell stated that by moving the pipeline to sandy and higher ground nearby, the right-of-way would require less underground drainage. Additionally, according to M^me^ Campbell, this alternative route could run along the boundaries of her lands rather than cross them diagonally, with the result that the pipeline would have much less impact on drainage.

M^me^ Campbell mentioned during the hearing that if the Board ruled against relocating the existing pipeline, she wanted TransCanada to implement Mr. Benoît's proposed improvements to TransCanada's proposed solution to the drainage problem. M^me^ Campbell also requested that the work be monitored by Mr. Benoît or by a Board representative, with mandatory monitoring for a minimum of five years and annual reporting to the Board.

3.2.1 Location of new route

According to TechnoRem Inc., the clay soil on lots 185 and 187 are conducive to the formation of ruts and soil compaction during major excavation and backfilling work. The report also indicated that the formation of ruts caused by heavy equipment wheels and treads, the compacting of the ground and the excavation and backfilling work could result in erosion and the mixing of topsoil and subsoil, thus reducing fertility and therefore crop yield. The report went on to say that construction activities would result in greater apparent density in the work area and on the right-of-way, making the soil less able to eliminate water accumulating on the surface from rain and groundwater runoff, thus causing an increase in surface runoff that could accelerate soil erosion. TechnoRem Inc. further indicated that although measures for mitigating soil compaction are now better known and developed, the activities associated with laying a new pipeline near the existing pipeline would only exacerbate the existing problem on lots 185 to 187.

During the hearing, Mr. Benoît pointed out the problems relating to soil decompaction, and explained that clays are soils that are very vulnerable to compaction and that once the soil has compacted, the process to reverse the compaction would be extremely time-consuming. As a result, even if decompacting was done site by site, some areas could be improved, but never the

entire area. He estimated that the results of decompacting would be apparent for a few years, and that even if no equipment was present, compaction could resume merely because of the very nature of the soil. He explained that subsequently, the soil would have to be well drained when cultivating it, that there would necessarily be a drop in yield, and that it would take time (up to 10 years) and good crop management for things to improve.

Accordingly, M[me] Campbell proposed relocating the existing pipeline and the Loop to another route that would run along the boundaries of her property, on the north and east sides, for a total of about 1,580 metres. This route would be located within a buffer zone planted with a perennial crop. M[me] Campbell stated that the proposed alternative route would not negatively impact drainage on the right-of-way and that outside the buffer zone the impacts would be limited to one hectare where soil is vulnerable to compaction and 0.6 hectares where the soil is not vulnerable to compaction.

3.2.2 Alternative mitigation measure(s)

With respect to TransCanada's proposed plans for improving underground drainage near the pipeline (described in section 3.3.2 below), M[me] Campbell, via Mr. Benoît, explained that there was a significant risk that the drainage on the right-of-way would still be deficient, despite the proposed plans. M[me] Campbell submitted that TransCanada's proposed spaces between the drains were too far apart, and put forth the possibility, which she believes is reasonable, that the pipeline could generate underground water runoff along the pipeline and that because of the topography, this runoff would be in the direction of the lowest part of the lots, i.e., toward the centre of the existing route. As a result, in her opinion, providing enough drainage to ensure that the right-of-way could dry as quickly as the rest of the field would require the following improvements to TransCanada's proposed drainage plans:

- space the drains on the right-of-way fewer than 10 metres apart, i.e., approximately seven metres apart;
- install six bypasses on the underground drains on each of the pipelines, right next to the pipeline, and install a bed of draining sand there.
- construct three diagonal water channels, at the appropriate locations and install a diagonal underground drain beneath each of these water channels to ensure that they dry out quickly and can be crossed by agricultural equipment without damaging the soil.

Mr. Benoît added during the hearing that the seven-metre spacing was intended to achieve equivalent drainage efficiency, which would require, "[Translation] a bit extra". He thus recommended that, to accelerate drainage, a drain line be added to the one already proposed, and that it correspond to a space of about seven metres.

Several of M[me] Campbell's other experts addressed the spacing issue, including Mr. Lauzon, who explained that regardless of the distance between the drains at the location where standing water accumulated on the surface, installing the drains centimetres apart would not necessarily improve the system, and that the system had to be improved in terms of surface drainage. He acknowledged that he was unable to determine whether TransCanada's stone wells or Mr. Benoît's drain bypasses with sand beds was the best method for eliminating surface water

every year. According to Ms. Barrington, drains could be added, but they could not be in a layer of compact soil, otherwise the additional drains would be useless. She agreed that using drain spacing similar to the spacing used in the field would be a good idea, but that drain performance would depend on the density and frequency of soil compaction and she was not sure that spacing the drains 10 metres apart would solve the drainage problem.

Jean Asnong, M[me] Campbell's husband and former co-owner of the lots was questioned at the hearing, and in response, spoke about his experience as a farmer and his drainage and crop management experience. He also expressed his concerns about soil compaction and the residual capacity of the soils following construction of the Saint-Sébastien Loop.

3.3 Position of TransCanada

TransCanada indicated that if the Saint-Sébastien Loop went ahead, given that construction of the proposed Loop would necessarily affect the existing drainage on lots 185, 186 and 187, it would have to alter the current drainage system in order the install the Loop. TransCanada added that the modified drainage system plans, including changes to the existing drainage system, would be a reasonable solution to M[me] Campbell's alleged drainage problems, but only if the Loop went ahead. TransCanada committed to providing lots 185, 186 and 187 with drainage equivalent to that on the adjacent sections of the said lots, if the Saint-Sébastien project were to go ahead. TransCanada also confirmed that if the landowners noted inferior yields, they would be compensated by TransCanada.

3.3.1 Location of new route

TransCanada proposed that the Loop route parallel the route of the existing pipeline, as it proposed for the Saint-Sébastien project. On 6 September 2006, the Board approved the project and concluded that, provided that TransCanada's environmental protection and mitigation measures were implemented, and that the Board's conditions were met, the project would not be likely to entail significant negative environmental effects.

3.3.2 Alternative mitigation measure(s)

TransCanada's proposal consists of plans showing modifications before, during and after construction. These changes and the plans for the existing drainage system are shown on nine drainage system plans that TransCanada entered in the file. TransCanada's proposal includes drains to be installed longitudinal to the pipeline spaced approximately 10 metres apart. TransCanada also proposed removing the topsoil in the affected area before making changes to the underground drainage system or waiting until the trench is excavated and then making the appropriate changes. Additionally, if groundwater was found circulating along the pipeline and toward the surface in areas containing clay-type soil, TransCanada proposed installing one or more stone wells in addition to installing or extending the underground drain to intercept the water. TransCanada also subsequently offered to install rigid polyvinyl chloride (PVC) pipe to replace the galvanized steel pipe at the points where the collectors cross to support the agricultural drain. Furthermore, TransCanada indicated that it would be able to install other stone wells within the work area for the proposed construction. The stone wells would be installed at the lowest points of the lots, and if M[me] Campbell wanted, the stone wells, which are usually

temporary, could be left in place, in which case the work area would be graded to direct surface water toward the stone wells. All of these measures are discussed in Exhibits C-2-16G, C-2-16H and C-2-20B.

TransCanada disagreed with M^me^ Campbell's proposed improvements to TransCanada's proposed drainage plans to provide enough drainage to ensure that the land off and on the right of-way dried at the same speed. TransCanada explained that leaving a space of less than 10 metres (i.e., seven metres) between the drains on the right-of-way would not be appropriate. TransCanada pointed out that M^me^ Campbell's consultants confirmed that the existing drainage system was adequate for draining the adjacent fields, and added that M^me^ Campbell's proposed modifications would result in clearly superior drainage, which would be a benefit during rainy years but could be a disadvantage in dryer years.

With respect to the proposed installation of bypasses on the underground drains and sand beds to capture and direct the water to the underground drains, TransCanada explained that the proposed stone wells would be amply sufficient to capture the ground water. Finally, TransCanada indicated that the proposed construction of three diagonal water channels to ensure that the three vulnerable drainage areas identified by F. Bernard experts-conseils dried quickly would offer clearly superior drainage, not equivalent drainage, which would not be fair to all the landowners affected by the Loop.

Concerning Mr. Benoît's statements regarding the difficulty completely and permanently decompacting the soil, TransCanada cited a report titled *Prévention et correction de la compaction lors des travaux de l'installation du gazoduc* prepared by Denis Ferland and Guy Mercier of Urgel Delisle et Associés in January 1986, which indicates that compaction is a problem that can be resolved. Also, during the hearing, Claude Veilleux, engineer and agronomist, explained that several decompaction techniques could be used, with potentially very good results.

Views of the Board

The Board notes that it is unfortunate that the right-of-way and the existing pipeline cross M^me^ Campbell's lots diagonally. The Board finds that in this context, companies should, wherever possible, promote pipeline routes that run along field boundaries and along infrastructure or existing physical obstacles. The Board also notes that Groupe Conseil UDA inc. itself stated that one of the location criteria was to promote a route that runs along the boundary lines of cultivated fields, existing infrastructures and lot boundaries. The Board adds that this practice is even more appropriate in cultivated areas where soil and land conditions are problematic, i.e., vulnerable to compaction, poor conductivity and the presence of a drainage system or the need to install a drainage system. The Board further notes that another location criteria, one also recognized by Groupe Conseil UDA inc., is to promote the development of a right-of-way contiguous to existing rights-of-way to avoid adding other artificial but permanent boundaries to the properties. The Board therefore notes that in the case of the Loop, although the proposed route is not ideal,

having ruled that the existing pipeline should not be moved, it is preferable to lay the second pipeline parallel to the existing pipeline. Otherwise, there would be two separate rights-of-way, the total width of which would be greater than that required for twinned rights-of-way. It is better to twin the Loop with the existing pipeline to limit the impacts, including environmental impacts, of the pipeline's operation and the cessation of operations at the end of a pipeline's life. The Board notes that the proposed alternative route would involve environmental impacts relating to the removal and relocation of the existing pipeline, as well as to the construction of the Loop on a new right-of-way. Furthermore, a new right-of-way on the boundary of M[me] Campbell's lands could cause impacts on adjacent lands. These impacts, their scope and their duration are not known at this time, given that no evidence to that effect needed to be entered in part one of the hearing. This aspect would have been examined in part two of the hearing.

It is the Board's view that despite the additional problems and difficulties relating to soil type and adjacent conditions, there are effective solutions for mitigating these potential problems. Accordingly, relocating the Loop is not the only possible means of mitigating the effects of the Loop's construction and maintenance.

The Board is of the view that TransCanada's proposed solution for resolving M[me] Campbell's drainage problems, which are not caused by the existing pipeline, is reasonable. The Board notes that TransCanada's proposed measures comply with existing standards, and that TransCanada has many years of experience building and operating pipelines. The Board further notes that Groupe Conseil UDA inc. also has experience and expertise with changes to the drainage system for land operated by agricultural producers, and the mitigation measures put in place when working on agricultural land, including when a pipeline crossed lands composed of all kinds of clay. Accordingly, the Board finds that there is a sufficiently high probability that TransCanada's proposed measures will succeed.

Additionally, the Board notes that with respect to spacing between the drains, Mr. Benoît stated that "[Translation] a bit extra" would be required, thus justifying the addition of a drain. The Board finds that the design of a drainage system should be based on a series of measures and that a statement such as this, which was not supported by calculations or new facts, is not sufficient to justify such a step, particularly given that several experts, both M[me] Campbell's and TransCanada's, generally agree that the drains should be spaced 10 to 15 metres apart. According to TransCanada's proposed plans, the spacing with the addition of the Loop would be approximately 10 metres and thus within the spacing recommended by Mr. Lamarre and Mr. Benoît in his report.

The Board further finds that the proposed stone wells are an appropriate solution to directing surface runoff from the work area toward the underground drains and thus promoting conditions conducive to the work. The Board notes that M[me] Campbell should be consulted on the location of the stone wells and that on-site observations, primarily concerning the slopes, should be considered before work commences. It is the Board's view that these stone wells could be left on the property, if M[me] Campbell so desires, which TransCanada has offered to do. With respect to the diagonal water channels, the Board is of the view that this is liable to provide drainage that it superior to the drainage on sections adjacent to M[me] Campbell's lots. The Board wishes to promote equitable treatment for all landowners affected by the Saint-Sébastien Loop right-of-way, and finds that this measure proposed by M[me] Campbell is not warranted in this case. The Board also notes TransCanada's statements that superior drainage could be a problem during dry seasons. The Board notes that M[me] Campbell pointed out that the heterogeneity of the drainage in the fields is affecting operations on all of her lands. The Board therefore finds that the measures that TransCanada has undertaken to implement (nine plans, letters of 14 May 2007 and TransCanada's responses to the Board's Information Request 1.2) are reasonable under the circumstances and that additional measures are not required. The Board notes that TransCanada has undertaken to adhere to these measures if the Loop goes ahead.

The Board wishes to point out the very eloquent testimony given by Mr. Asnong. The Board clearly understands his concerns, which are shared by the applicant, M[me] Campbell. The Board is of the view that a condition should be added to the order already issued by the Board for the Saint-Sébastien Loop, pertaining to M[me] Campbell.

TransCanada shall file an Environmental Monitoring Program Report for the Saint-Sébastien Loop pertaining to M[me] Campbell's lots 185, 186 and 187, no later than 31 January of each year, for a period of five years following commencement of operations of the Loop. The monitoring program shall include, but not be limited to, auditing and assessing rehabilitation upon completion of various project activities. The report shall also contain an analysis of crop yield and residual drainage on agricultural lots upon completion of the work, and any other unresolved problems.

The Board wishes to point out that the Board implemented a Conformity Verification Plan following the approval of the TransCanada Eastern Mainline Expansion project, including the Saint-Sébastien Loop. This plan sets out various means for ensuring the company's compliance with the measures proposed in that proceeding, including land inspection by Board inspection officers and experts, and compliance with conditions of approval. The Board notes that if problems persist after the five-year monitoring program ends, there are various avenues of recourse, for

example, the Landowner Complaint Resolution Program and the Appropriate Dispute Resolution (ADR) process, which provide informal and formal options for resolving these types of issues.

The Board notes M^me^ Campbell's statement that the BAPE submitted in its report on the proposed Saint-Sébastien Loop that the Landowners affected by the project apparently were not adequately informed of their rights to oppose the project.

The Board is of the view that it would not be appropriate to comment on observations made by BAPE, but would like to make the following observations. First, according to the evidence in the file, M^me^ Campbell did indeed receive the notices required under sections 87 and 104 of the Act.

Additionally, the Board held an oral hearing to consider M^me^ Campbell's section 46 application. As set out in Hearing Order MH-1-2007, the Board specified that it would also consider an application under section 21 of the Act to vary its decision on the Saint-Sébastien Loop. Consequently, it is the Board's view that M^me^ Campbell had the opportunity to state her concerns and objectives regarding the Saint-Sébastien Loop.

Chapter 4

Right of entry

4.1 TransCanada's right of entry application

On 20 April 2007, TransCanada filed an application for immediate right of entry with respect to M[me] Campbell's lands, pursuant to section 104 of the Act, including the schedule as required under paragraph 55(c) of the *National Energy Board Rules of Practice and Procedure, 1995*.

TransCanada confirmed that M[me] Campbell was served with a notice pursuant to subsection 104(2) of the Act on 8 March 2007. The Landowners and Bell Canada were also served with the notice on 22 February 2007.

TransCanada noted that negotiations with M[me] Campbell commencing 28 September 2005 did not resolve all concerns regarding the proposed Saint-Sébastien Loop, specifically:

- compensation for the permanent easement;
- compensation for the 30-metre safety zone;
- pipeline depth; and
- the development of permanent crossings on the right-of-way for non-agricultural heavy equipment.

TransCanada noted that it was unable to reach a settlement with M[me] Campbell.

4.2 Information Requests to TransCanada

The Board issued an Information Request to TransCanada on 28 May 2007 seeking clarification on the amount of area required for the permanent right-of-way for the Saint-Sébastien Loop and for the temporary work area, and asking why the application for right of entry referred to a larger area of land than the section 58 application had originally mentioned.

In its response dated 31 May 2007, TransCanada replied that the section 58 application indicated that a permanent right-of-way 15 metres in width would be required. The permanent right-of-way indicated in the right of entry application was amended to include the temporary area required only to construct the Loop. TransCanada had intended to acquire the temporary area under a short-term agreement with the Landowner. TransCanada also indicated that once the temporary areas were no longer required, it intended to quit claim any rights to those areas.

4.3 Comments by M[me] Campbell

On 7 May 2007, M[me] Campbell filed a written objection and additional comments regarding the application for right of entry. In her additional comments, M[me] Campbell reiterated her objection

and indicated that it was essential that the Board rule on her section 46 application before granting TransCanada a right of entry order. According to M^me^ Campbell, experts she had hired were in the process of preparing reports on the impacts on her lots and she expected to be forwarding the reports to the Board shortly. TransCanada's proposed changes to her drainage system were unacceptable to her because they did not take into account the type of soil on her lands. Finally, M^me^ Campbell questioned why TransCanada maintained that it was urgent that the work begin, given that, according to her, the gas delivery contract with Vermont Gas Systems Inc. would not begin before November 2007.

4.4 Comments by Union des producteurs agricoles

On 3 May 2007, Union des producteurs agricoles Fédération de l'UPA de Saint-Hyacinthe (UPA), representing the Landowners, filed comments on TransCanada's right of entry application. Their primary concerns were related to the following issues:

- an appeal of the decision by the Commission de protection du territoire agricole du Québec (CPTAQ) was pending;
- negotiations under the Appropriate Dispute Resolution process were still ongoing;
- compensation by TransCanada for experts' fees;
- resolutions concerning management of the permanent right-of-way;
- setting aside of the concept of a permanent right-of-way; and
- an agreement to resolve drainage problems.

4.5 Response by TransCanada

4.5.1 To comments by M^me^ Campbell

In its response to M^me^ Campbell's comments, TransCanada submitted that a number of the elements were identical to those listed by the UPA. With respect to M^me^ Campbell's specific concerns, TransCanada submitted that:

- crop losses were not due to TransCanada's existing pipeline; TransCanada asked the Board to consider its right of entry application at the same time as the application to alter the route;
- reports on impacts to M^me^ Campbell's lands had already been filed;
- the proposed changes were presented at a meeting with M^me^ Campbell on 26 April 2007 and TransCanada was still waiting for a response from M^me^ Campbell; and
- it was important that construction begin in early summer to minimize the impact on agricultural lands.

TransCanada stated in conclusion that it wished to continue with negotiations and the Board's Appropriate Dispute Resolution process but that these processes did not preclude consideration

of its right of entry application and that any compensation-related issues exceeded the scope of the proceeding.

4.5.2 To comments by Union des producteurs agricoles

In its reply dated 11 May 2007 to comments by UPA, TransCanada explained the background to its right of entry application, and noted that UPA supported the Loop construction project at the outset and adopted a resolution dated 9 February 2006 stating that it did not oppose the project.

On 5 May 2006, the Syndicat de l'UPA de Venise created a Saint-Sébastien Loop committee mandated to negotiate a better agreement for the Landowners affected by the project. In TransCanada's opinion, given that the mandate was to negotiate compensation, which should not be confused with the right of entry application, its right of entry application should be considered and negotiations should continue at the same time.

TransCanada also pointed out that it has always been diligent in informing landowners about the project and in addressing their concerns appropriately in order to reach agreement. TransCanada explained that despite sending several invitations to the UPA for meetings, TransCanada had to request the appointment of a negotiator pursuant to section 88 of the Act.

4.6 Right of entry ruling

On 11 July 2007, the Board issued right of entry orders against five landowners affected by the Saint-Sébastien Loop. The Board notes that the concerns raised by these landowners are similar to those raised by M^{me} Campbell.

As discussed in these Reasons for Decision, the Board decided to consider M^{me} Campbell's section 46 application and TransCanada's right of entry application in the same proceeding, in an oral hearing. No additional evidence was placed on the file concerning the right of entry application, however, both parties presented their arguments on this issue at the hearing.

M^{me} Campbell reiterated her objection to the construction of the new pipeline on the route proposed by TransCanada. However, she indicated that she would agree to a new easement for one dollar if the new pipeline was located within the north boundary of lots 185, 186 and 187 and within the boundaries of lots 184 and 185.

In its argument, TransCanada noted that it had met the requirements for a right of entry application, and asked the Board to issue the right of entry order with only those conditions filed in its application.

Views of the Board

The Board finds that TransCanada has met the requirements of its section 104 application for right of entry, and that no objections were filed that would justify denying this application.

The Board has also considered the submissions of the parties and the UPA and the reply comments of TransCanada. While the Board understands that the landowners, M^{me} Campbell in particular, have concerns about several issues regarding the pipeline, in the Board's view, these relate primarily to compensation issues, which are outside of the Board's jurisdiction, and are operational matters.

As set out in its decision dated 11 July 2007 concerning the other Orders granting right of entry with respect to the Saint-Sébastien Loop, the Board expects that TransCanada, its representatives and M^{me} Campbell will work together in an attempt to reach an agreement and achieve a positive and productive relationship for the future.

The Board has issued Order RE-T211-12-2008 pursuant to subsection 104(1) of the Act. The Board notes that the Order granting right of entry covers both the permanent right-of-way and temporary work areas. TransCanada has also indicated that once the temporary work areas are no longer required, it will quit claim any rights to these areas. The Board expects that TransCanada will honour this commitment and take the steps required to quit claim these temporary rights.

Chapter 5

Requirements of section 46 of the Act

The parties filed submissions concerning the requirements of section 46 of the Act. M[me] Campbell argued that a section 46 application is not subject to any obligation requiring that it be in the public interest, while TransCanada argued that according to section 46, together with paragraph 12(1)(b) of the Act, giving consideration to the public interest is an intrinsic part of the Board's functions, and the Board was required to take the public interest into account when considering M[me] Campbell's section 46 application and find a solution that is in the public interest.

First, the Board wishes to clarify that it has already determined that the Saint-Sébastien Loop is required for the public interest, and that this is not at issue. The only issue in question is determining whether the pre-requisite set out in paragraph 46(1)(b) of the Act to determining whether the route of an existing pipeline should be changed, i.e., to prevent interference with M[me] Campbell's drainage system, also requires consideration of the public interest.

The Board finds it appropriate to comment on the requirements of section 46 of the Act. Paragraph 46(1)(b) of the Act reads as follows:

> 46. (1) The Board may, on such terms and conditions as it considers proper, direct a company to divert or relocate its pipeline if the Board is of the opinion that the diversion or relocation is necessary
>
> ...
>
> (b) to prevent or remove an interference with a drainage system.

As Applicant, M[me] Campbell has the onus of showing, on a balance of probabilities, that the existing pipeline should be relocated to prevent interference with her drainage system. In the Board's view, the words, "if the Board is of the opinion that the diversion or relocation is necessary" denote final recourse. In other words, the Board is of the view that M[me] Campbell must first establish a causal relationship between the existing pipeline and interference with her drainage system. If this relationship is established, on a balance of probabilities, the Board must then be satisfied that the diversion or relocation of the route "is necessary" or is the only means capable to prevent the interference. According to the Board, even if a causal relationship is established, this does not imply that a diversion or relocation is necessary if there are other means available to prevent interference with the drainage system.

Furthermore, if a causal relationship is established and it is shown that the diversion or relocation of the route is necessary because there are no other means of preventing the interference with the drainage system, the Board may then order the relocation or diversion, on such terms and conditions as it considers proper.

If no causal relationship between the existing pipeline and an interference with a drainage system is established, section 46 of the Act cannot be invoked to direct a company to relocate the route of its pipeline.

The Board has discretion under section 46, as evidenced by use of the words "the Board may." It is well settled that discretion must be exercised in the spirit of the enabling legislation, and be based on proper considerations. Discretion must be exercised in good faith, and not in an unreasonable manner.

Unlike the other provisions of the Act in which Parliament took care to indicate that the public interest must be considered explicitly, paragraph 46(1)(b) of the Act does not contain any requirement of that nature. On the other hand, the Board has frequently remarked that the public interest influences all aspects of its activities[9]. The Board recognizes that all of its decisions must be implicitly in the public interest in that the Board cannot make arbitrary and groundless decisions. However, the Board does not accept that the principle of the public interest, which is fluid and evolves over time, should be raised to the status of a "test" for the purposes of paragraph 46(1)(b) of the Act where there is no explicit mention by Parliament to that effect.

In the Board's view, the primary goal of paragraph 46(1)(b) is to protect a private interest in a case in which an existing pipeline is interfering with a specific drainage system. If the Board establishes a link as set out above, it may direct the company to relocate or divert its existing route where necessary. As explained, this requires that the landowner show that the pipeline is interfering with his or her drainage system, and show that the only method capable to prevent such interference is to relocate the pipeline. In such a case, there would be an actual interference, which Parliament intended to remedy by ordering the relocation of an existing route, in the interest of a particular landowner, and not in the interest of the general public. Although the concept of the public interest may be a relevant consideration in that in some measure it transcends all of the Board's activities, a landowner is not required, pursuant to paragraph 46(1)(b), to show that the relocation of the route is in the public interest. On the other hand, the Board recognizes that pursuant to paragraph 12(1)(b) of the Act, it may take the public interest into account when considering taking an action that it is legally authorized to take.

Accordingly, the Board is in partial agreement with both parties concerning the requirements of paragraph 46(1)(b) of the Act and the concept of public interest. M^{me} Campbell was not required to show that relocating the existing pipeline route is in the public interest, but rather that the pipeline is interfering with her drainage system and that the only way to prevent such interference is to relocate the pipeline route. The Board also agrees that the concept of public interest always bears a certain relevance in the exercise of its discretion.

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9 *Report of Joint Public Review Panel for the Sable Gas Projects*, page 140.

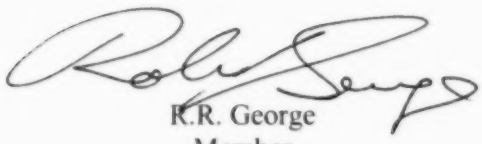
Chapter 6

Disposition

The foregoing chapters constitute the Board's decision and Reasons for Decision in respect of the application to move TransCanada's pipeline, which is located on lands owned by Hélène Campbell, the application to alter the route of the Saint-Sébastien Loop, and the right of entry application by TransCanada. The Board recognizes that the parties met in an attempt to resolve the concerns at issue in this matter, but unfortunately were unable to arrive at a negotiated solution. The evidence filed by the parties shows that not only were there several examples of miscommunication and misinformation, there were certain occasions on which greater effort on the part of each party could have facilitated a better understanding of the parties' concerns, even if an agreement was not possible. The Board is always available to the parties, as a last resort, to rule on unresolved issues, where it is so authorized by the Act, but points out that it does not expect to address issues that the pipeline companies and landowners should be able to resolve among themselves or by availing themselves of the Board's Appropriate Dispute Resolution process, which is available to all the parties.

J. S. Bulger
Presiding Member

S. Leggett
Member



R.R. George
Member

Calgary, Alberta
March 2008

Appendix I

Ruling on Reply Evidence

214. **CHAIR:** Good morning everyone.

215. In response to M[me] Campbell's request that she be allowed to file her reply evidence outside the prescribed time frame, the Board has decided as follows.

216. M[me] Campbell, when the Board is asked to allow a party to file documents late, it considers whether the applicant has satisfied the Board that the documents provide relevant information, that the delay is warranted, and that the party acted with diligence to meet the deadlines, which apparently was agreed upon as 2:00 p.m. on 7 January 2008, and whether the delay could be prejudicial to the other party to the proceeding, were your reply evidence to be accepted into the file.

217. The Board notes that your delay is due to the fact that you thought you had until 9 January, which was the date originally agreed upon, and to the fact that you dismissed your lawyer last Saturday, with the result that you are representing yourself, on your own.

218. The Board further notes that you have been diligent in making your request as soon as possible, and notes TransCanada's objections to the effect that the delay has created a prejudice, in that TransCanada did not have time to prepare appropriately, and thus is unfair.

219. The Board appreciates that the reply evidence is an extremely important aspect of M[me] Campbell's case. However, the Board must ensure that the procedure is equitable for all parties, and thus finds that some elements of the reply evidence are appearing for the first time in the file and that as a result, TransCanada cannot prepare appropriately at this stage in the hearing.

220. The Board finds that it should allow the reply evidence to be filed, but not in its entirety. The Board is of the view that the sections of the evidence relating to Mr. St-Denis create too great a prejudice for TransCanada and should be excluded.

221. As for the remainder of the evidence, the Board is prepared to allow it to be filed, but wishes to ensure that TransCanada has the opportunity to prepare accordingly. The Board is prepared to proceed immediately, in which case we will also hear Ms. Vachon at 11:00 a.m., or the Board is prepared to adjourn until 2:00 p.m., and asks TransCanada to state its preference.

222. The Board notes that M[me] Campbell's reply evidence is now identified as Exhibit B-36.

--- EXHIBIT NO./PIÈCE No. B-36:

Reply evidence of Hélène Campbell and schedules

223. **CHAIR:** Also, in view of our ruling, Mr. St-Denis' testimony, which is marked Exhibit B-36D, will be excluded from the list of exhibits.

224. Louise Niro will now give you a copy of the list of B exhibits.

225. The Board also notes that TCPL does not object to the witness change, apart from Mr. St-Denis' proposed presence, and agrees with TCPL's position that this is clearly prejudicial to TransCanada. Accordingly, the Board does not agree with M[me] Campbell introducing Mr. St-Denis as a witness.

226. Finally, the Board notes that M[me] Campbell may not have been made aware of the change in date. However, given that she had legal representation at that time, the Board would assume that he would have kept you up to date.

227. Furthermore, it is not appropriate for the Board or its legal counsel to contact you directly once you have obtained legal representation. Communications must go through your lawyer.

228. Mr. Delwaide, do you want to go ahead right now or would you like to adjourn until 2:00 p.m.?

229. **MR. DELWAIDE:** Can I have a moment to consult?

230. **CHAIR:** Absolutely, go ahead.

--- (A short pause/Courte pause)

231. **MR. DELWAIDE:** Can I get some clarification?

232. You specifically mentioned Mr. St-Denis, so the portions of the testimony concerning Mr. St-Denis were removed, but paragraph 4.1 also contains excerpts concerning Mr. Sépul, Mr. Van Hyfte, Mr. Huot.

233. Are these excerpts to remain in the file, or will they be removed as well? I just wanted to clarify.

Appendix II

Amending Order AO-1-XG-T001-14-2006

ORDER AO-1-XG-T001-14-2006

IN THE MATTER OF the *National Energy Board Act* (the Act) and the Regulations made thereunder;

IN THE MATTER OF a Section 46 Application dated 29 March 2007 by Hélène Campbell to also alter the route of the proposed Saint-Sébastien Loop and filed with the National Energy Board under File OF-Fac-Gas-T211-2006-01 02

BEFORE the Board on 6 March 2008.

WHEREAS TransCanada PipeLines Limited (TransCanada) filed a Section 58 Application dated 20 March 2006 for its 2007 Eastern Mainline Expansion in the provinces of Ontario and Quebec, including a proposed loop at Saint-Sébastien (Saint-Sébastien Loop);

AND WHEREAS on 6 September 2006 the Board issued Order XG-T001-14-2006, the effect of which was to approve the Saint-Sébastien Loop, among other facilities;

AND WHEREAS on 29 March 2007 Hélène Campbell filed a Section 46 Application to relocate TransCanada's existing pipeline, which crosses M^{me} Campbell's lots in the Paroisse de Saint-Sébastien;

AND WHEREAS Hélène Campbell's application also requested changes to the route of the proposed Saint-Sébastien Loop;

AND WHEREAS in the event that M^{me} Campbell's application was not approved, M^{me} Campbell proposed certain recommendations concerning monitoring of construction of the Saint-Sébastien Loop;

AND WHEREAS the Board has heard representations by TransCanada concerning these monitoring recommendations;

AND WHEREAS the Board is of the view that certain of the proposed recommendations are in the public interest, with respect to M^{me} Campbell's lots 185, 186 and 187, and finds that it is appropriate to amend Order XG-T001-14-2006 to reflect the recommendations accepted by the Board;

IT IS ORDERED THAT pursuant to section 21 of the Act, Order XG-T001-14-2006 be amended by this Amending Order, by adding the following condition, to be inserted following Condition 5:

5b. TransCanada shall file an Environmental Monitoring Program Report for the Saint-Sébastien Loop, with respect to M^{me} Campbell's lots 185, 186 and 187, no later than 31 January of each year, for a period of five years following commencement of operations of the Loop. The monitoring program shall include, but not be limited to, auditing and assessing rehabilitation upon completion of various project activities. The report shall also contain an analysis of crop yield and residual drainage on agricultural lots upon completion of the work, and any other unresolved problems.

NATIONAL ENERGY BOARD

Claudine Dutil-Berry
Secretary of the Board

Appendix III

Section 104 Right-of-Entry Order

ORDER RE-T211-12-2008

IN THE MATTER OF the *National Energy Board Act* (the Act) and the Regulations made thereunder;

IN THE MATTER OF an application (the Application) by TransCanada PipeLines Limited (TransCanada) for an Order pursuant to subsection 104(1) of the Act, granting the immediate right to enter certain lands being part of Lots 185, 186 and 187 of the official land register of the Paroisse de Saint-Sébastien (Saint-Jean registry office) in the Province of Québec (the Lands), filed with the National Energy Board under File OF-Fac-Gas-T211-2006-01-ROE 07.

BEFORE THE BOARD on 6 March 2008.

WHEREAS the Board has issued Order XG-T001-14-2006, dated 6 September 2006, in respect of certain facilities known as the Saint-Sébastien Loop for the transmission of natural gas, and all associated facilities and works connected therewith;

AND WHEREAS TransCanada filed an Application for Immediate Right of Entry, dated 20 April 2007, pursuant to subsection 104(1) of the Act and in compliance with the requirements of section 55 of the *National Energy Board Rules of Practice and Procedure, 1995*;

AND WHEREAS the Board is satisfied that Hélène Campbell (the Landowner) has, not less than thirty days and not more than sixty days prior to the date of the Application, been served with a notice pursuant to subsection 104(2) of the Act;

AND WHEREAS the Landowner filed a written objection with respect to the Application, dated 7 May 2007;

AND WHEREAS the Fédération de l'Union des producteurs agricoles de Saint-Hyacinthe filed a written objection with respect to the Application, dated 3 May 2007;

AND WHEREAS the Applicant has requested an order pursuant to section 104 of the Act so that it may obtain an interest in and registration of title to the said lands;

AND WHEREAS the Board is of the view that it would be in the public interest to grant this application;

AND WHEREAS the Board is of the view that it would be proper to issue the Order as applied for;

IT IS ORDERED THAT TransCanada is granted the immediate right to enter certain lands owned by the Landowner, all of which lands and rights are more particularly described in the Schedule attached to and forming part of this Order.

NATIONAL ENERGY BOARD

Claudine Dutil-Berry
Secretary of the Board